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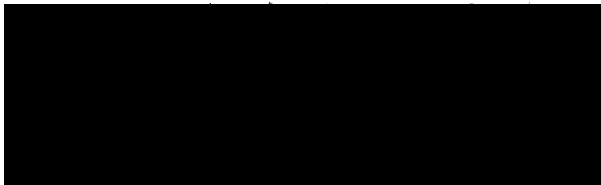
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a quality control inspector. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 19, 1999. The proffered wage as stated on the Form ETA 750 is \$22.53 per hour, which amounts to \$46,862.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of December 1989.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of 3,000,000¹, and to currently employ 114 workers. It is unclear from the record of proceeding what the petitioner submitted in support of the petition, but from the director's subsequent request for evidence, apparently no evidence was provided.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 11, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence from 1999 to the present date.

¹ Presumably "\$3,000.000" means "\$3,000,000" instead of "\$3,000," a number closer to that reported on the petitioner's tax returns.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the years 1999 through 2001. The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Gross receipts/sales	\$3,096,049	\$3,096,225	\$2,704,686
Compensation of officers	\$104,000	\$106,000	\$102,000
Cost of labor	\$2,123,032	\$2,207,179	\$1,897,092
Net income ²	\$21,560	\$2,582	\$16,054
Current Assets	\$42,764	\$28,375	\$41,789
Current Liabilities	\$50,009	\$64,670	\$46,320
Net current assets	-\$7,245	-\$36,295	-\$4,531

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 18, 2003, denied the petition.

On appeal, counsel resubmits the petitioner's tax returns along with a letter from the petitioner's certified public accountant (CPA) [REDACTED] dated March 26, 2002 [REDACTED] letter states, in pertinent part, the following:

The [petitioner] demonstrated its ability to pay the [beneficiary] more than sufficiently by paying the wages of \$1,897,092, \$2,207,179 [sic] and \$2,123,032 for the years 2001, 2000 [sic] and 1999, respectively. Such numbers can be found on the form 1120, page 2, line 3 (titled cost of labor). Because the [petitioner] is a manufacturing company, all wages, except those of the officers, were capitalized as a part of a cost of goods sold. Therefore, the wages paid for those years are shown on the page 2, as opposed to being shown more conventionally on the form 1120, line 13 (titled salaries and wages).

Additionally [REDACTED] that the petitioner paid over \$100,000 in compensation to officers, and that if depreciation expenses were added back to the net income, the petitioner would show "solid net income for all three years on a cash flow basis."

At some point during the pendency of these proceedings, additional evidence was submitted into the record of proceeding. The additional evidence includes an additional copy of the petitioner's 2001 tax return and a newly submitted 2002 tax return. Since the petitioner's 2002 tax return was most probably unavailable prior to the director's decision and filing of the appeal, the evidence will be accepted. The petitioner's 2002 tax return reflects the following:

	<u>2002</u>
Gross receipts/sales	\$2,783,599
Compensation of officers	\$100,000
Cost of labor	\$1,954,085
Net income	\$24,560
Current Assets	\$72,600

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Current Liabilities	\$24,986
Net current Assets	\$47,614

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary states that she was employed by the petitioner, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any of the relevant years – 1999, 2000, or 2001. Thus, the petitioner did not present a *prima facie* case of its ability to pay the proffered wage through its actual payment of wages at the proffered wage rate to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.³ Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income for the years 1999 through 2002 was \$21,560, \$2,582, \$16,054, and \$24,560, respectively. None of those amounts cover the proffered wage of \$46,862.40. Thus, the petitioner has not demonstrated its ability to pay the proffered wage out of its net income for 1999 through 2002.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

³ This is contrary to Mr. Whang's implied recommendation to add depreciation expenses back to the net income.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during 1999 through 2001, however, were negative. It would be impossible for the petitioner to pay the proffered wage out of a negative number. The petitioner's net current assets for 2002, however, were \$47,614, which is greater than the proffered wage of \$46,862.40. Thus, the petitioner has demonstrated its ability to pay the proffered wage in 2002 through its net current assets, but failed to demonstrate its ability to pay the proffered wage from 1999 through 2001 through its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, the petitioner shows a net income of only \$21,560 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a net income of only \$2,582 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$16,054 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a net income of only \$24,560, but has net current assets of \$47,614, which is greater than the proffered wage of \$46,862.40 and has, therefore, demonstrated the ability to pay the proffered out of net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.